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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

By Hand

EX PARTE OR LATE FILED

Ms. Magalie Roman Salas
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Notice of *Ex Parte* Presentation Regarding CC Docket No. 96-45 ✓

Dear Ms. Salas:

On behalf of Nucentrix Broadband Networks, Earl Comstock of Sher & Blackwell met with Katherine Schroder and Richard Smith of the Accounting Policy Division of the Common Carrier Bureau to discuss the public interest standard applicable to determinations under section 214(e) of the Communications Act (47 U.S.C. 214(e)) with respect to whether or not a common carrier may be designated as an eligible telecommunications carrier in areas served by a rural telephone company. The discussion focused on what additional criteria, if any, should be applied in making the determination other than those specifically set forth in section 214(e)(1).

Mr. Comstock provided the attached excerpts from S. 652 as passed by the Senate in June of 1995 and the Senate Committee report that accompanied that bill, and suggested that the more detailed criteria in the text passed by the Senate of what became section 214(e) as enacted indicates that Congress was concerned with protecting consumers, and not rural telephone companies, in providing discretion as to whether or not an additional carrier should be designated. Further, the changes to the Senate language adopted in the House-Senate conference on S. 652 demonstrate that competition was given greater weight in the final provision that was agreed upon, and indicate that the public interest analysis should not be used to thwart competition. Finally, Mr. Comstock pointed out that section 214(e)(4) of the enacted legislation provides specific guidance to the Commission and the States with respect to allowing an eligible carrier to exit the market once a second carrier is designated. Thus, a determination as to whether a carrier could meet the requirements regarding facilities that might be necessitated if section 214(e)(4) is invoked could be

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identified by the Commission as the appropriate public interest inquiry that stays within the bounds of the statute and focuses on the Congressional concern that consumers in the area served by a rural telephone company will continue to be adequately served by the remaining eligible telecommunications carrier should the rural telephone company decide to relinquish its carrier of last resort status.

Please direct any questions regarding this filing to the undersigned.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Earl W. Comstock', with a long horizontal flourish extending to the right.

Earl W. Comstock

Counsel for Nucentrix.

Attachment

cc: Katherine Schroder
Richard Smith

such allocation is explicit and applied in a competitively neutral manner.

Subsection (j) of new section 253 states that the subsections that provide that all telecommunications carriers shall contribute to universal service, preserve the States' authority to adopt their own definitions and mechanisms, establish eligibility for universal service support, and control the level of universal service support shall take effect one year after the date of enactment of this bill.

Sec. 104. Essential telecommunications carriers

Section 104 of the bill would amend section 214(d) of the 1934 Act by designating the existing text of section 214(d) as paragraph (1) and by adding seven new paragraphs regarding designation of essential telecommunications carriers. It is the intent of the Committee that the authority of the FCC and the States to designate essential telecommunications carriers parallels their traditional certification authority. These amendments are not intended to change the traditional jurisdictional division between Federal and State authority with respect to telecommunications. Thus the bill provides that the FCC shall designate essential telecommunications carriers for interstate services and the States shall designate such carriers for intrastate services, which the Committee intends should include intrastate interexchange services.

New paragraph (2) of section 214(d) makes explicit the implicit authority of the FCC or a State to require a common carrier to provide service to any community or portion of a community that requests such service. In the event that more than one common carrier provides service in an area, and none of the carriers will provide service to a community or portion thereof in that area which requests service, this paragraph gives the FCC or a State the authority to decide which common carrier is best suited to provide such service. If the FCC or a State orders a carrier to provide service to a community or portion thereof under this paragraph, it shall designate such carrier an essential telecommunications carrier.

Paragraph (3) of new section 214(d) provides that the FCC or a State may designate a common carrier as an essential telecommunications carrier for a particular service area, thus making that carrier eligible for support payments to preserve and advance universal service, if any such payments are established under new section 253 of the 1934 Act. Any carrier designated as an essential telecommunications carrier must provide universal service and any additional services specified by the FCC or a State throughout the service area for which the designation is made. In addition, these services must be offered throughout that service area at non-discriminatory rates established by the FCC or a State, and the carrier must advertise those rates using media of general distribution.

The Committee intends that essential telecommunications carriers will only be designated in those areas where the actual cost of providing universal service is greater than the amount that the carrier providing those services may recover based on the affordable rate for those services established by the FCC or a State. For areas where carriers may provide universal service for costs (in-

cluding a reasonable profit) that are at or below the affordable rate, no designation would be needed.

New paragraph (4) of section 214(d) allows the FCC or a State to designate more than one common carrier as an essential telecommunications carrier for a particular service area. The decision to make such an additional designation is at the discretion of the FCC or a State. In addition, the bill permits a State to require additional findings before designating more than one common carrier as an essential telecommunications carrier. The Committee intends that the same obligations and risks would apply to each essential telecommunications carrier designated for a particular service area.

To the extent that more than one common carrier is designated as an essential telecommunications carrier, each additional carrier so designated must meet the same requirements with respect to service throughout the same service area at nondiscriminatory rates established by the FCC or a State, as well as the advertisement of those rates.

New paragraph (5) of section 214(d) requires the FCC and the States to establish rules governing the use of resale by a carrier to meet the requirements for designation as an essential telecommunications carrier, as well as rules to permit a carrier that has been designated as an essential telecommunications carrier to relinquish that designation so long as at least one other carrier has also been designated as an essential telecommunications carrier for that area. The Committee expects that these rules will be based on recommendations from the Joint Board required under section 103(a) of the bill, and will ensure that a carrier using resale has at least some facilities in the area being served and that the carrier has adequate financial resources to fulfill its commitment to provide universal service throughout that area. The Committee notes that such commitment may require a carrier to build or extend facilities in an area in order to provide service, particularly if the carrier whose services are being resold should choose to cease service in that area. To this end new paragraph (5) also requires the FCC and the States to provide appropriate rules to govern how quickly an essential telecommunications carrier whose services are being resold may cease service to an area, in order to provide other essential telecommunications carriers adequate notice to extend their facilities or to arrange for the purchase of replacement facilities or services.

New paragraph (6) of section 214(d) sets forth the penalties applicable to an essential telecommunications carrier which refuses an FCC or State order to provide universal service within a reasonable period of time. In determining what constitutes a reasonable period of time, the bill provides that the FCC or a State must consider the nature of the construction required to provide such service, the time interval that normally would attend such construction, and the time needed to obtain regulatory or financial approval.

New paragraph (7) of section 214(d) of the Act requires the FCC or a State to designate an essential telecommunications carrier for interexchange services for any unserved community or portion thereof that requests such service. An essential telecommunications carrier designated under this paragraph must provide service at nationwide geographically averaged rates, in the case of interstate

services, and geographically averaged rates in the case of intrastate services. The Committee intends that the requirement to provide nationwide geographically averaged rates includes the rate integration provided for in the FCC's proceeding entitled "Integration of Rates and Services for the Provision of Communications by Authorized Common Carriers between the United States Mainland and the Offshore Points of Hawaii, Alaska, and Puerto Rico/Virgin Islands" (61 FCC2d 380 (1976)). The FCC or a State may allow a carrier designated under this paragraph to receive support payments, if any, that may be provided under section 253. The Committee intends that a carrier designated under this paragraph would only be eligible for support payments if such payments were necessary to compensate a carrier for services to a community or portion thereof that such carrier was actually ordered by the FCC to serve because no other carrier would do so.

New paragraph (8) of section 214(d) grants the FCC authority to promulgate guidelines for the States to implement this section. The Committee intends that the FCC will use this authority to delegate to the States authority that has traditionally been exercised in this area by the States, and, if necessary, to establish guidelines to provide for consistency among the States in the implementation of these amendments.

Sec. 105. Foreign investment and ownership reform

Section 105 adds a new subsection (f) to section 310 of the 1934 Act. Existing section 310(b) of the 1934 Act provides in relevant part that an alien may not obtain a common carrier license, and that an alien may not own more than 25% of any corporation that directly or indirectly owns or controls any corporation to which a common carrier license is granted.

New subsection (f) creates a system of reciprocity for common carrier licenses. Paragraph (1) states that the FCC may grant to an alien, foreign corporation, or foreign government a common carrier license that would otherwise violate the restrictions in section 310(b), if the FCC finds that there are equivalent market opportunities for U.S. companies and citizens in the foreign country where the alien is a citizen, in which the foreign corporation is organized, or in which the foreign government is in control. This determination will be made on a market segment specific basis. The Committee believes that the FCC has the requisite expertise to make this market segment specific determination.

Foreign countries point to section 310(b) as a reason to deny U.S. companies entry into their markets. By applying a reciprocity rule, U.S. markets will be open to foreign investment from that country, to the same extent that the foreign markets are open to U.S. investment.

When the FCC makes its determination, the FCC may look beyond where the corporation is organized if the corporation is owned, in whole or in part, by individuals, corporations, or a foreign government whose home is not where the corporation is organized. This will prevent a foreign entity from organizing in a country with a more open policy toward U.S. investment than its home country, in order to circumvent the U.S. reciprocity restrictions.

1 term on the capital invested to provide such service
2 to such area, and—

3 “(2) providing a service to such area will be less
4 profitable for the carrier than providing the service
5 in areas to which the carrier is already providing or
6 has proposed to provide the service.

7 “(b) The Commission shall provide for public com-
8 ment on the adequacy of the carrier’s proposed service
9 area on the basis of the requirements of this section.”.

10 **SEC. 104. ESSENTIAL TELECOMMUNICATIONS CARRIERS.**

11 (a) IN GENERAL.—Section 214(d) (47 U.S.C.
12 214(d)) is amended—

13 (1) by inserting “(1) ADEQUATE FACILITIES
14 REQUIRED.—” before “The Commission”; and

15 (2) by adding at the end thereof the following:

16 “(2) DESIGNATION OF ESSENTIAL CARRIER.— If one
17 or more common carriers provide telecommunications
18 service to a geographic area, and no common carrier will
19 provide universal service to an unserved community or any
20 portion thereof that requests such service within such
21 area, then the Commission, with respect to interstate serv-
22 ices, or a State, with respect to intrastate services, shall
23 determine which common carrier serving that area is best
24 able to provide universal service to the requesting unserved
25 community or portion thereof, and shall designate that

1 common carrier as an essential telecommunications carrier
2 for that unserved community or portion thereof.

3 “(3) ESSENTIAL CARRIER OBLIGATIONS.—A common
4 carrier may be designated by the Commission, or by a
5 State, as appropriate, as an essential telecommunications
6 carrier for a specific service area and become eligible to
7 receive universal service support under section 253. A car-
8 rier designated as an essential telecommunications carrier
9 shall—

10 “(A) provide through its own facilities or
11 through a combination of its own facilities and re-
12 sale of services using another carrier’s facilities, uni-
13 versal service and any additional service (such as
14 911 service) required by the Commission or the
15 State, to any community or portion thereof which re-
16 quests such service;

17 “(B) offer such services at nondiscriminatory
18 rates established by the Commission, for interstate
19 services, and the State, for intrastate services,
20 throughout the service area; and

21 “(C) advertise throughout the service area the
22 availability of such services and the rates for such
23 services using media of general distribution.

24 “(4) MULTIPLE ESSENTIAL CARRIERS.—If the Com-
25 mission, with respect to interstate services, or a State,

1 with respect to intrastate services, designates more than
 2 one common carrier as an essential telecommunications
 3 carrier for a specific service area, such carrier shall meet
 4 the service, rate, and advertising requirements imposed by
 5 the Commission or State on any other essential tele-
 6 communications carrier for that service area. A State shall
 7 require that, before designating an additional essential
 8 telecommunications carrier, the State agency authorized
 9 to make the designation shall find that—

10 “(A) the designation of an additional essential
 11 telecommunications carrier is in the public interest
 12 and that there will not be a significant adverse im-
 13 pact on users of telecommunications services or on
 14 the provision of universal service;

15 “(B) the designation encourages the develop-
 16 ment and deployment of advanced telecommuni-
 17 cations infrastructure and services in rural areas;
 18 and

19 “(C) the designation protects the public safety
 20 and welfare, ensures the continued quality of tele-
 21 communications services, or safeguards the rights of
 22 consumers.

23 “(5) RESALE OF UNIVERSAL SERVICE.—The Com-
 24 mission, for interstate services, and the States, for intra-
 25 state services, shall establish rules to govern the resale of

1 universal service to allocate any support received for the
2 provision of such service in a manner that ensures that
3 the carrier whose facilities are being resold is adequately
4 compensated for their use, taking into account the impact
5 of the resale on that carrier's ability to maintain and de-
6 ploy its network as a whole. The Commission shall also
7 establish, based on the recommendations of the Federal-
8 State Joint Board instituted to implement this section,
9 rules to permit a carrier designated as an essential tele-
10 communications carrier to relinquish that designation for
11 a specific service area if another telecommunications car-
12 rier is also designated as an essential telecommunications
13 carrier for that area. The rules—

14 “(A) shall ensure that all customers served by
15 the relinquishing carrier continue to be served, and
16 shall require sufficient notice to permit the purchase
17 or construction of adequate facilities by any remain-
18 ing essential telecommunications carrier if such re-
19 maining carrier provided universal service through
20 resale of the facilities of the relinquishing carrier;
21 and

22 “(B) shall establish criteria for determining
23 when a carrier which intends to utilize resale to
24 meet the requirements for designation under this
25 subsection has adequate resources to purchase, con-

1 struct, or otherwise obtain the facilities necessary to
2 meet its obligation if the reselling carrier is no
3 longer able or obligated to resell the service.

4 “(6) ENFORCEMENT.—A common carrier designated
5 by the Commission or a State as an essential telecommuni-
6 cations carrier that refuses to provide universal service
7 within a reasonable period to an unserved community or
8 portion thereof which requests such service shall forfeit
9 to the United States, in the case of interstate services,
10 or the State, in the case of intrastate services, a sum of
11 up to \$10,000 for each day that such carrier refuses to
12 provide such service. In determining a reasonable period
13 the Commission or the State, as appropriate, shall con-
14 sider the nature of any construction required to serve such
15 requesting unserved community or portion thereof, as well
16 as the construction intervals normally attending such con-
17 struction, and shall allow adequate time for regulatory ap-
18 provals and acquisition of necessary financing.

19 “(7) INTEREXCHANGE SERVICES.—The Commission,
20 for interstate services, or a State, for intrastate services,
21 shall designate an essential telecommunications carrier for
22 interexchange services for any unserved community or por-
23 tion thereof requesting such services. Any common carrier
24 designated as an essential telecommunications carrier for
25 interexchange services under this paragraph shall provide

1 interexchange services included in universal service to any
2 unserved community or portion thereof which requests
3 such service. The service shall be provided at nationwide
4 geographically averaged rates for interstate interexchange
5 services and at geographically averaged rates for intra-
6 state interexchange services, and shall be just and reason-
7 able and not unjustly or unreasonably discriminatory. A
8 common carrier designated as an essential telecommuni-
9 cations carrier for interexchange services under this para-
10 graph that refuses to provide interexchange service in ac-
11 cordance with this paragraph to an unserved community
12 or portion thereof that requests such service within 180
13 days of such request shall forfeit to the United States a
14 sum of up to \$50,000 for each day that such carrier re-
15 fuses to provide such service. The Commission or the
16 State, as appropriate, may extend the 180-day period for
17 providing interexchange service upon a showing by the
18 common carrier of good faith efforts to comply within such
19 period.

20 “(8) IMPLEMENTATION.—The Commission may, by
21 regulation, establish guidelines by which States may im-
22 plement the provisions of this section.”.

23 (b) CONFORMING AMENDMENT.—The heading for
24 section 214 is amended by inserting a semicolon and “es-
25 sential telecommunications carriers” after “lines”.

(c) TRANSITION RULE.—A rural telephone company is eligible to receive universal service support payments under section 253(e) of the Communications Act of 1934 as if such company were an essential telecommunications carrier until such time as the Commission, with respect to interstate services, or a State, with respect to intrastate services, designates an essential telecommunications carrier or carriers for the area served by such company under section 214 of that Act.

**SEC. 105. FOREIGN INVESTMENT AND OWNERSHIP RE-
FORM.**

(a) IN GENERAL.—Section 310 (47 U.S.C. 310) is amended by adding at the end thereof the following new subsection:

“(f) TERMINATION OF FOREIGN OWNERSHIP RESTRICTIONS.—

“(1) RESTRICTION NOT TO APPLY WHERE RECIPROCITY FOUND.—Subsection (b) shall not apply to any common carrier license held, or for which application is made, after the date of enactment of the Telecommunications Act of 1995 with respect to any alien (or representative thereof), corporation, or foreign government (or representative thereof) if the Commission determines that the foreign country of which such alien is a citizen, in which such corpora-